IN THE

# Supreme Court of the United States

October Term, 1971

No. .....

CHARLES E. BOWDEN,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## REPLY BRIEF OF PETITIONER

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### ARGUMENT IN REPLY

The United States in reply to the petition for certiorari suggests that this case may be moot. Brief of the Respondent, p. 2 n.1. We respectfully urge that certain events discussed below which took place subsequent to the docketing of the Petition have not rendered this case moot.

On July 22, 1971, the Department of Justice submitted to counsel for petitioner a document captioned "APPLICATION AND ORDER VACATING JUDGMENT OF CONTEMPT AGAINST CHARLES E. BOWDEN." The Government in its "application" stated it had concluded that "no useful purpose will now be

accomplished by Mr. Bowden's further appearance before said Grand Jury" and requested that the contempt citation be vacated. On August 6, 1971, a hearing was held in the United States District Court for the Western District of Washington and the court per the Honorable George W. Boldt, Chief Judge, denied the Government's motion.[1]

The motion submitted to the District Court offered no guarantees that the petitioner would not be called at some future time during the pending investigation. The Government has made no assertion that it has completed the basic investigation which gave rise to the subpoena issued to this petitioner. The Grand Jury before which the petitioner appeared is still in session and in this regard we note that this is the second Grand Jury to investigate antitrust matters which gave rise to the subpoena received by the petitioner. Should the instant petition be dismissed as moot, the Government could immediately change its mind and resubpoena petitioner causing him once again to commence climbing the long path leading to this Court.

The decision that the petitioner's testimony was not needed was apparently reached during the 28-day period between June 24, 1971 and July 22, 1971.[2] The Government asserted that the decision was "reached as a result of [a] review of documents submitted to the Grand Jury and an analysis of all testimony pursuant to this investigation." App. A. It is within the knowledge of petitioner's counsel

1. A copy of the "Application and Order" is set forth in Appendix A. The document contains a handwritten notation by the court refusing to enter the Order. The petitioner filed a brief with the District Court in which it was asserted that the court did not have jurisdiction to hear the Government's motion.

2. The Government in its motion stated that this decision was reached subsequent to the ruling on June 24, 1971 by the Court of Appeals. As previously noted counsel for petitioner was first informed of the government's decision 28 days later on July 22, 1971. Coincidently the petition for a writ of certiorari was docketed with this Court on July 22, 1971.

that some of the evidence produced in this investigation has been in the Government's possession for a period well in excess of one year. Thus the decision not to call the petitioner as a witness has some distinctly capricious aspects. We urge that under these circumstances it would be manifestly unfair to dismiss this case as moot leaving the petitioner with no guarantee that he will not receive a second subpoena to testify in the investigation which gave rise to the first subpoena.

This case should not be held to be moot as a matter of law. Applicable decisions of this Court have held that so long as the underlying controversy remains alive, a case will not be found moot even though technical matters may provide a superficial basis for such a finding. In view of the Government's failure to provide assurances that this witness will not be called in the investigation which gave rise to his subpoena and in view of its failure to give any indication that this investigation has been completed, a very real possibility exists that petitioner will again be called to testify. Therefore, it must be concluded that the underlying controversy which gave rise to this case still exists.

With respect to mootness, we believe the present case closely parallels the decision in *McGrain v. Daugherty*, 273 U.S. 135 (1927). In *McGrain* the United States Senate, as a result of accusations that a former Attorney General was guilty of corruption, empowered a select committee to investigate the circumstances and facts of the alleged corruption. This committee on two occasions subpoenaed M. S. Daugherty, brother of the former Attorney General under investigation. The witness was personally served with subpoenas but on each occasion refused to appear.

The committee referred this matter back to the full Senate which passed a resolution directing the sergeant-at-

arms to take Daugherty into custody and bring him before the Senate to answer questions pertinent to the inquiry. A deputy sergeant-at-arms took the witness into custody for the purpose of bringing him before the Senate as commanded. The witness petitioned a federal court for a writ of habeas corpus.

The investigation was ordered and the select committee was appointed during the Sixty-eighth Congress. That Congress expired March 4, 1925. This Court at the time of its decision in 1927 noted that it must resolve the issue whether the case became moot at the termination of the Sixty-eighth Congress. This Court found that "the select committee having this investigation in charge has neither made a final report nor been discharged; nor has it been continued by an affirmative order." *Id.* at 181. It was noted that the activities of the committee apparently had been suspended, pending a decision in the case. Under these circumstances, this Court held that the case was not moot, stating in part:

> "[T]he committee may be continued or revived now by motion to that effect, and, if continued or revived, will have all its original powers. This being so, and the Senate being a continuing body, the case cannot be said to have become moot in the ordinary sense. The situation is measurably like that in *Southern P. Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 514-516, 55 L. ed. 310, 315, 316, 31 Sup. Ct. Rep. 279, where it was held that a suit to enjoin the enforcement of an order of the Interstate Commerce Commission did not become moot through the expiration of the order where it was capable of repetition by the commission and was a matter of public interest. Our judgment may yet be carried into effect and the investigation proceeded with from the point at which it apparently was interrupted by reason of the habeas corpus proceedings. In these circumstances we think a

judgment should be rendered as was done in the case cited." *Id.* at 181-182 (footnote omitted)[3]

In *McGrain* this Court commented that the judgment "may yet be carried into effect" thus recognizing by a negative implication that the decision might never have any substantive effect. The opinion also noted that a Congressional motion may be necessary to empower the Committee to take further action. Nonetheless, the case was decided on the merits because the order was "capable of repetition" and "a matter of public interest" was involved. These criteria are applicable to the instant proceeding. The petitioner may receive a second subpoena during the course of the Government's ongoing antitrust investigation and the question of whether the immunity provisions of the Organized Crime Control Act are constitutional is a matter of a great public interest.

Our position with respect to mootness is supported by *Motor Coach Employees v. Missouri*, 374 U.S. 74 (1963). That case arose when employees of a transit system elected to go on strike. The Governor of Missouri acting under the authority of a state law known as the King-Thompson Act[4] issued an executive order taking over the property of the transit company. The state then sought an injunction pur-

3. In *Southern P. Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 55 L.Ed. 310, 31 S. Ct. Rep. 279, the basic issue involved the validity of a "cease and desist" order issued by the Interstate Commerce Commission. The Order was of a two-year duration and had expired prior to the time this court reached its decision. Noting that the issue of mootness must be resolved because the underlying order had expired, this Court found that judicial redress must be available for short term orders which are capable of repetition recognizing that a contrary result would undermine the judicial process. This Court observed "[the fact that] the government is the respondent not complainant, does not lessen or change the character of the interest involved in the controversy, or terminate its questions." *Id.* at 516. Thus, in the instant case the fact that the Government is the Respondent should also be of no import.

4. See *Motorcoach Employees v. Missouri* at 376 n.1.

suant to a provision of the Act which made it unlawful to strike against a utility after possession has been taken by the state. The constitutionality of this action was challenged on a number of grounds.

After the Appellant's jurisdictional statement was filed, the Governor of Missouri issued an executive order which although reciting that the labor dispute remained unsolved terminated the outstanding seizure order. It was thus contended that the case had become moot. The Court held that the case was not moot and distinguished two cases[5] cited in support of the mootness contention, as follows:

> "In both of those cases, however, the underlying labor dispute had been settled and new collective bargaining agreements concluded by the time the litigation reached this Court. Here by contrast the labor dispute remains unresolved. There thus exists in the present case not merely the speculative possibility of invocation of the King-Thompson Act in some future labor dispute, but the presence of an existing unresolved dispute which continues subject to all the provisions of the Act." *Id.* at 377-378.

The *Motorcoach Employees* case is further recognition of the proposition that a case is not moot so long as the underlying controversy remains in existence. There are many other decisions which support the basic position we have taken with respect to mootness, e.g. *Carroll* v. *Commissioners of Princess Anne*, 393 U.S. 175 (1968); *United States* v. *W. T. Grant*, 345 U.S. 629 (1953); *Walling* v. *Helmerich & Payne*, 323 U.S. 37 (1944); *FTC* v. *Goodyear Tire & Rubber Co.*, 304 U.S. 257 (1938); *United States* v. *Trans-Missouri Freight Assoc.*, 166 U.S. 290 (1897).

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5. The cases distinguished by this Court were: *Oil, Chemical & Atomic Workers Intl. Union* v. *Missouri*, 361 U.S. 363 (1960) and *Harris* v. *Battle*, 348 U.S. 803 (1954).

The Government contends that this case will be governed by *Kastigar* v. *United States*, No. 70-117 certiorari granted, May 17, 1971 and thus suggests that disposition of this petition be postponed until *Kastigar* is decided. We respectfully urge that this Court reject the Government's suggestion.

In resolving the issue presented by these cases, this Court must decide whether the principles enunciated in *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892), will have continuing effect. Unlike *Kastigar*, *Counselman* and the present case both arose in a business context. We believe that it may facilitate this Court's evaluation of *Counselman* to have before it a case which arose in circumstances similar to those in that decision. The instant case might bring into focus various problems relative to the conduct of businesses which may have motivated the Court in reaching the decision in *Counselman*. In addition, we submit that the basic issue presented is of great constitutional significance and therefore the Government's suggestion might serve to deprive this Court of legal viewpoints which could be of assistance in the resolution of this important issue.

## CONCLUSION

For these reasons, a Writ of Certiorari should be issued to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

CHARLES S. MULLEN
THOMAS W. TOP
FREDERICK O. FREDERICKSON
*Counsel for Petitioner*

Dated: September 10, 1971

APPENDIX A

FILED IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

AUG - 6 1971

CHARLES A. SCHAAF, CLERK
By _____ Deputy

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

IN RE GRAND JURY PROCEEDINGS
In the Matter of Charles E. Bowden

APPLICATION AND ORDER VACATING JUDGMENT OF CONTEMPT AGAINST CHARLES E. BOWDEN

Charles E. Bowden, a grand jury witness, was adjudged to be in civil contempt of this Court on April 27, 1971 for refusing to testify before the grand jury pursuant to a subpoena ad testificandum issued by this Court granting him immunity under the provisions of the Organized Crime Control Act of 1970, 18 U.S.C. §6001 et seq. (Public Law 91-452). Said Judgment of Contempt provided that the witness was to be confined at a place to be determined by the Attorney General or his authorized representative until such time as he was willing to testify before said grand jury, but not to exceed the life of the term of said grand jury. Execution of the order was stayed upon appeal of the order until 60 days after the Court of Appeals mandate is returned to this Court.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.
ATTEST: CHARLES A. SCHAAF
Clerk, U. S. District Court
Western District of Washington
By _____ Deputy Clerk

Subsequently an appeal was taken to the Court of Appeals and the Judgment of Contempt was affirmed on June 24, 1971. Issuance of a mandate was stayed, however, for thirty days to enable appellant to apply to the Supreme Court for a writ of certiorari.

Since the order of the Court of Appeals was issued, counsel for the Government have determined that no useful purpose will now be accomplished by Mr. Bowden's further appearance before said grand jury. This decision has been reached as a result of review of documents submitted to the grand jury and an analysis of oral testimony received pursuant to this investigation. The Government therefore applies to this Court for an order vacating and dismissing the Judgment of Contempt against Charles E. Bowden.

Presented by:

James E. Figenshaw

James E. Figenshaw
Attorney, Department of Justice

THE COURT, having considered the above matter, HEREBY ORDERS THAT the Judgment of Contempt against Charles E. Bowden is vacated.

Dated this _____ day of August 1971.

UNITED STATES DISTRICT JUDGE

Approved as to Form; Notice of Presentation Waived:

Refused 8/6/71

Charles S. Mullen of
Graham, McCord, Dunn, Moen,
Johnston & Rosenquist
Attorney for the Witness